(2)

Supreme Court, U.S.
FILED
JAN 2 - 2001
CLERK

No. 00-906

In The

Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,

Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL J. PASTORE
Counsel of Record
5401 Uhlman Road
Fairview, PA 16415
Phone: (814) 836-2884
Fax: (814) 836-2974

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE FACTS 1

ARGUMENT 8

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Bush v. Gore, 531 U.S. ___ (December 12, 2000) 9

Equal Employment Opportunity Commission v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) 24

Equal Employment Opportunity Commission v. Local 350, Plumbers and Pipefitters, 998 F.2d 641 (9th Cir. 1992) 24

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) ... 7, 21, 22

Huff v. UARCO, Inc., 122 F.3d 374 (7th Cir. 1997) ... 23, 24

Hyland v. New Haven Radiology Associates, PC, 794 F.2d 793 (2d Cir. 1986) 15

Johnson v. State of New York, 49 F.3d 75 (2d Cir. 1995) 22

McKeever v. Ironworker's District Council, 65 U.S.L.W. 2608, 70 Fair Empl. Prac. Cas. (BNA) 44548, 73 Fair Empl.Prac.Cas. (BNA) 1000, 1997 WL 109569 (E.D.Pa. 1997) 16

Milwaukee Professional Fire Fighters Association, Local 215, IAFF, AFL-CIO v. City of Milwaukee, 869 F.Supp. 633 (E.D.Wis. 1994) 16

Ohio Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 10, 27

Robinson v. Shell Oil Company, 519 U.S. 337 (1997) 15, 16, 17

Schism v. United States, 972 F.Supp. 1398 (N.D.Fla. 1997) 16

STATUTES AND REGULATIONS:

29 U.S.C. § 621 *et seq.* 6

29 U.S.C. § 623(a)(1) 10, 16

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 623(a)(1)(B) 18

29 U.S.C. § 623(f) 12, 13

29 U.S.C. § 623(f)(2)(B)(i) 8, 25

29 U.S.C. § 623(i) 11

29 U.S.C. § 623(j) 11

29 U.S.C. § 623(l) 11

29 U.S.C. § 623(l)(1)(B) 18

29 U.S.C. § 623(l)(2) 20

29 U.S.C. § 623(l)(2)(A) 18, 20

29 U.S.C. § 623(l)(2)(D) 18, 20, 21

29 U.S.C. § 630(b) 14

29 U.S.C. § 630(l) 11

42 U.S.C. § 2000e-3(a) 15

Older Workers Benefit Protection Act of 1990, Pub.L. No. 101-433, 104 Stat. 978 (October 16, 1990) 10

29 C.F.R. § 1625.10 13

29 C.F.R. § 1625.10(a)(1) 13

29 C.F.R. § 1625.10(e) 9, 13, 25, 26

MISCELLANEOUS:

EEOC Compliance Manual No. 915.003 (October 3, 2000) 9

S.Rep. No. 101-263, at 5, *reprinted in* 1990 U.S.C.C.A.N. 1509 10

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE FACTS

Since 1972 the Erie County Employees' Retirement Board, and then Petitioner, the County of Erie, Pennsylvania (the "County"), maintained a policy of providing health care benefits to certain former County employees, including Respondents (the "Retirees"). Historically County retirees were provided traditional indemnity health insurance plans.[1] In recent years these plans were issued by Highmark Blue Cross/Blue Shield ("Highmark"), the regional Blue Cross/Blue Shield licensee. The County had two coverage "groups" of retirees, one consisting of "Medicare eligible" retirees, and one consisting of non-Medicare eligible retirees. Until recently these two plans were very similar. The only significant difference between the two older plans was that the plan provided to the Medicare-eligible retirees was "Medicare coordinated."[2]

---

[1] Generally, under a traditional indemnity plan, an insured can "self-refer" and obtain covered treatment from almost any medical care provider, but there are policy "deductibles" and "co-pays" and usually the insured must complete various coverage claims forms.

[2] The plan described this coordination as follows:

> If you are entitled to Medicare benefits (either due to age or disability) your Blue Cross and Blue Shield Program will not duplicate payments or benefits provided under Medicare. However, your Blue Cross and Blue Shield Program will supplement the Medicare benefits, including the deductible and coinsurance not covered by Medicare, provided the services are eligible under your group's Blue Cross and Blue Shield Program.

In 1997 County officials decided that the County would mandate changes to health care benefits for its eligible retirees. The first group the County targeted was its oldest retirees because "it was a larger group" and the County could realize the greatest cost savings by forcing this group into a less expensive plan. The County decided to force its oldest retirees, all of whom were "Medicare eligible" because of their age, into the Highmark "SecurityBlue" plan.

The SecurityBlue plan is generally described as a "Medicare HMO" plan. It is a traditional HMO-plan which requires almost all care to be initially authorized by the insured's "gatekeeper" or "primary care physician" ("PCP"), and virtually all treatment provided outside the "network" of SecurityBlue providers located in Northwest Pennsylvania is not covered. It is also a "Medicare HMO", which in this situation means generally that the insured elects SecurityBlue coverage and thereby surrenders her right to receive benefits under Medicare, the Federal government makes a *per capita* payment to Highmark in lieu of providing Medicare benefits to the insured, and Highmark agrees to insure the provision of services as set forth under the terms of the SecurityBlue plan (which benefits may differ from traditional Medicare-provided benefits). At least initially, and apparently because of the size of the Retiree group and Highmark's receipt of payment from the Federal government, Highmark did not charge *any* premium to the County to provide SecurityBlue benefits to the Retirees.

The County determined that effective February 1, 1998, all eligible County Medicare-eligible retirees, who

reside within the SecurityBlue coverage area,[3] would be required to elect the SecurityBlue insurance plan or lose all coverage from the County. In July 1998, when Judith Lynch, the County Executive responsible for making the decision to switch coverages, explained to the press what the County had done, she said: "What the County did was to put all retirees sixty-five and older into the Security Blue. They have essentially the same benefits but without the cost to the County."

Effective February 1, 1998, as a result of this mandated change, approximately 235 County retirees age 65 and over and their spouses were forced to either accept the SecurityBlue coverage, or discontinue their coverage from the County and obtain their own health insurance coverage.[4] When the change was implemented, the County paid nothing to provide the SecurityBlue coverage to County retirees age 65 and over, while it continued to pay a significant premium for each County retiree under age 65 who had coverage under the old Highmark indemnity plan. The County retirees covered under SecurityBlue were required to continue to pay approximately $43 per month for Medicare Part B or they would lose their coverage under SecurityBlue. Younger retirees under the old Highmark indemnity plan made a $12 per

---

[3] The SecurityBlue coverage area includes most counties in northwestern Pennsylvania.

[4] Discovery showed that after the change was implemented, there were seven County retirees who were Medicare eligible due to disability rather than age and who were covered by SecurityBlue. These retirees were not eligible to be members of the Plaintiff class because they were not Medicare eligible due to age.

month premium contribution to the County for their coverage.

Subsequently the County announced that effective October 1, 1998, it would change the coverage for County retirees who were not Medicare eligible from their traditional Highmark indemnity plan to the "SelectBlue" plan. SelectBlue is another Highmark product which is generally described as a "point of service" plan. It combines the features of an HMO plan and a traditional indemnity plan. An insured under this plan can, for any health care incident, select either the HMO option and accept its benefits (including possibly lower costs and no claims forms) and limitations (including the need for PCP-coordinated care and the network limitations), or the traditional indemnity option (which provides, *inter alia*, the ability to "self-refer" and to obtain covered treatment from practically any medical provider anywhere). That change was implemented as planned on October 1, 1998 and now all County retirees under age 65 who are not Medicare eligible due to disability and who live within the Highmark service area have been forced into the SelectBlue plan. County retirees in the SelectBlue plan pay no premium to the County or the Federal government for that coverage.

Thus, after October 1, 1998, when the County had completed moving its retirees into new plans, the situation was this: The County paid nothing to provide the SecurityBlue coverage to Medicare-eligible retirees, and those retirees were required to pay approximately $43 per month for Medicare Part B to remain eligible for SecurityBlue. The County paid about $285 per month to provide SelectBlue coverage to non-Medicare-eligible retirees, and

those retirees paid nothing for their coverage. Retirees covered under the SecurityBlue plan had a pure HMO plan; retirees covered under SelectBlue had a point of service plan which provided both HMO-type coverage and traditional indemnity-type coverage. There were also many other differences between the benefits provided under the two plans. For example, the older retirees under SecurityBlue were limited to a prescription drug "formulary" while younger retirees under SelectBlue were not.

The County has realized a significant savings by forcing the Retirees into SecurityBlue, both by initially eliminating the cost of providing health care benefits to the Retirees, and by spending the least on benefits for the Retirees as compared to the cost to provide benefits to all other active County employees and non-Medicare eligible County retirees. Before the switch to SecurityBlue, the County was paying about $300 per person per month for medical benefits for the Retirees under the old Highmark indemnity plan. After the switch, it paid nothing to provide benefits to the Retirees. After the non-Medicare eligible retirees were switched to SelectBlue, the County was paying about $285 per month per person to provide coverage to these retirees under SelectBlue, while it continued to pay nothing to provide coverage to the older Retirees under SecurityBlue. Although in subsequent plan years Highmark has charged a premium to the County for covered Retirees under the SecurityBlue plan, that premium has always been significantly less than the premium charged to the County for the health care insurance provided to County retirees covered under any other plan. The record evidence shows the County used

the savings realized by forcing the Medicare-eligible retirees into SecurityBlue to, *inter alia*, defer the rising cost of providing traditional indemnity health care coverage to *active County employees*.

After being forced into the SecurityBlue plan, the Retirees brought suit asserting, *inter alia*, claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA). The Retirees class consists of those County retirees who were receiving health insurance benefits from the County on or before February 1, 1998, and who are "Medicare eligible" solely because they are age 65 or over, and who reside within the Highmark service territory, and who were therefore forced to either accept SecurityBlue or discontinue their health care coverage provided by the County. The basis for the Retirees' claims under the ADEA has consistently been: (a) but for the fact that they are age 65 or over, the Retirees would not have been forced into SecurityBlue and therefore the County is treating the Retirees differently "because of their age" in violation of the ADEA; and (b) the County cannot meet the "equal cost or equal benefit" "safe harbor" provisions of the ADEA because (i) the County is spending less to provide the SecurityBlue benefits to the Retirees than it is spending to provide health care benefits to younger retirees, and therefore the County cannot meet the "equal cost" safe harbor, and (ii) the benefits provided under SecurityBlue are different, and in certain ways lesser, than the benefits provided to younger retirees, and therefore the County cannot meet the "equal benefit" safe harbor.

Because the underlying facts are not disputed, both the Retirees and the County crossed-moved for summary judgment in the district court. The Retirees moved for a

judgment of liability only, asserting that the undisputed facts show a violation of the ADEA because the County is treating them differently in the provision of their health care benefits solely because they are age 65 or over, and therefore Medicare-eligible, and that the County cannot meet either safe harbor test. On summary judgment in the district court, the County's primary argument was that it was discriminating against the Retirees on the basis of their "Medicare eligibility" and not their age, and that this was permissible under this Court's ruling in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

The district court properly rejected the County's arguments and concluded that because "for the Plaintiffs, eligibility for Medicare followed ineluctably upon attaining age 65", and because "Plaintiffs' age was a determinative factor in their placement in the SecurityBlue Plan" (App., 63a), the County was discriminating against the Retirees "because of their age" in violation of the ADEA. However, the district court, *sua sponte*, raised the issue of "whether Plaintiffs, as retired persons, were entitled to protection under the ADEA." (App., 66a). Rejecting prior case law, the district court concluded "the ADEA clearly was not intended to apply to retirees . . . who premise their complaint on alleged disparities in the retirement health benefits based on Medicare-eligibility." (App., 89a). Based upon this conclusion raised by the district court itself, it granted the County's motion for summary judgment.

The Retirees appealed to the Third Circuit Court of Appeals. A panel of the court reversed, holding that it "cannot accept the district court's approach" that the

ADEA does not apply to the provision of health care benefits to Medicare-eligible retirees "for the straightforward reason that it is not reflected in the actual language of the ADEA or the [Older Workers Benefit Protection Act]." (App., 39a). The panel did agree with the district court's conclusion that "the County 'implemented an age-based criterion' by placing Medicare eligible retirees in SecurityBlue." (App., 35a). The panel concluded "that the safe harbor set forth in 29 U.S.C. § 623(f)(2)(B)(i) is applicable if the County can meet the equal benefit or equal cost standard." (App., 43a). The panel "remanded to the district court for a determination as to whether the standard has been satisfied." (App., 43a).[5] The County's petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals with no written dissent. This case is now before the district court awaiting resolution of the issues remanded.

ARGUMENT

There are no compelling reasons to grant a writ of certiorari in this case. The decision of the Third Circuit Court of Appeals in this case is not in conflict with any other decision by any other court of appeals. Rather, the decision below is entirely consistent with all the prior case law with the sole exception of the decision of the district court in this case.

---

[5] The Petitioner's statement (Petition for Certiorari, p. 5, n. 3) that the court of appeals remanded solely to determine whether the County can meet the "equal benefit" safe harbor is incorrect.

The decision of the court of appeals in this case is not in conflict with any decision by any state court of last resort. Similarly, Petitioners do not and cannot allege that the court of appeals has departed from the accepted and usual course of judicial proceedings, or that it has sanctioned such a departure by the lower court.

Indeed, the only basis on which the County asks this court to grant review is its assertion that this case involves an "issue of statutory construction that has not been, but should be, settled by this Court." (Petition for Certiorari, p. 5).

The issues in this case were properly identified and resolved by the court of appeals and there is no need for this Court's involvement. The two members of the panel who reached the merits agreed unanimously on the resolution of the issues, and the full Third Circuit Court of Appeals did not find the issues worthy of rehearing *en banc*. Not only are there no conflicting decisions of any court of appeals, all the relevant decisional law from the courts of appeals is consistent with the decision of the court of appeals in this case. The Equal Employment Opportunity Commission, which is charged with interpreting the ADEA, and whose interpretation is entitled to deference by this Court, *Bush v. Gore*, 531 U.S. ___ (December 12, 2000) (Ginsburg, J., dissenting, at 2), has interpreted the ADEA in a manner which is entirely consistent with the decision of the court of appeals below. 29 C.F.R. § 1625.10(e); EEOC Compliance Manual No. 915.003 (October 3, 2000).

Furthermore, this case is not even concluded and there has not yet been a finding whether the County even

violated the ADEA. This case has been remanded to the district court to provide the County the opportunity to prove whether it can meet either the equal cost or equal benefit test. Despite all the grave consequences postulated by the County, it still has the opportunity to demonstrate that it did not violate the ADEA in this case.

The specific contentions raised by the County will be addressed below. However, the applicable statutory provisions and interpreting regulations control the resolution of these issues, and they are set out first.

The general prohibitionary provision of the ADEA has always provided that it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any *individual* or otherwise discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* age. . . . " 29 U.S.C. § 623(a)(1) (emphasis added).

Prior to this Court's decision in *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), there was uncertainty over whether the ADEA applied to the discriminatory provision of employment or "fringe" benefits. In *Betts* this Court held that the ADEA did not apply to employment benefits. In 1990 Congress enacted the Older Workers Benefit Protection Act of 1990, Pub.L. No. 101-433, 104 Stat. 978 (October 16, 1990) (OWBPA), specifically intending to legislatively overrule *Betts*. The primary purpose of the OWBPA was to "make[ ] clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful." S.Rep. No. 101-263, at 5, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1510. One of the amendments to the ADEA included in the OWBPA was to

specifically define the phrase "compensation, terms, conditions, or privileges of employment" to "cover[ ] virtually all employee benefits and employee benefit plans." *Id.* The ADEA now provides that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. § 630(l). Thus, the ADEA currently provides that it is unlawful for an employer to discriminate against *any individual* with respect to *any and all employee benefits* because of such individual's age. Although the OWBPA adopted several clearly defined exceptions in 29 U.S.C. §§ 623(i), (j) and (l), none of those exceptions applies to the provision of health care benefits to retirees.

In the OWBPA Congress also expressly incorporated the EEOC's "equal cost/equal benefit" "safe harbor" regulations into the ADEA. This "safe harbor" permits an employer to discriminate in the provision of employee benefits if the test is satisfied. The statutory provision provides:

> It shall not be unlawful for an employer, employment agency, or labor organization –
>
> . . . .
>
> (2) To take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section –
>
> . . . .
>
> (B) To observe the terms of a bona fide employee benefit plan –

> (i) *Where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989);*
>
> . . . .
>
> Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (a), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter. . . .

29 U.S.C. § 623(f) (emphasis added).

The regulations referred to in 29 U.S.C. § 623(f) explain that under the equal cost/equal benefit standard,

> benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even

> though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. § 1625.10(a)(1).

Finally, at the time the OWBPA was enacted, through today, the regulations at 29 C.F.R. § 1625.10, which are expressly incorporated into the statutory "safe harbor" at 29 U.S.C. § 623(f), have specifically dealt with Medicare benefits. The relevant regulation provides:

> An employer does not violate the [ADEA] by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

29 C.F.R. § 1625.10(e).

The court of appeals has properly applied these statutory and regulatory provisions in this case to reach the conclusions that the Retirees are covered by the ADEA, that the County is discriminating against the Retirees on

the basis of their age, and that such discrimination violates the ADEA unless the County can prove on remand that it satisfies the equal cost or equal benefit safe harbor.

1. The County's primary argument in support of its petition is that the court of appeals erred in holding that the protection of the ADEA extends to retirees such as the Respondents in this case. Although the County argues that "the court of appeal's ruling is contrary to the statutory language of the ADEA" (Petition for Certiorari, p. 5), the County does not and cannot identify any specific provision of the ADEA to support its position because none exists.

The analysis of this issue is not difficult. The ADEA currently provides that it is unlawful for an employer to discriminate against *any individual* with respect to *any and all employee benefits* because of such individual's age. In our case, the claims of the Retirees arise out of the provision of health care benefits to them as part of the retirement benefits provided to them by the County. The Retirees are receiving health care coverage under the SecurityBlue plan because they are former employees of the County. The SecurityBlue coverage which the Retirees receive is plainly an "employee benefit", and therefore these benefits are encompassed within the statutory phrase "compensation, terms, conditions, or privileges of employment." There is no question that the County is an "employer" within the meaning of the ADEA, 29 U.S.C. § 630(b). Since the Retirees are indisputably "individuals", and since the ADEA unambiguously prohibits discrimination by "employers" "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age",

and since the provision of health care benefits to the Retirees is unambiguously an "employee benefit", the ADEA applies to the provision of SecurityBlue benefits to the Retirees.

The court of appeals agreed with this analysis. It held that "the ordinary meaning of the term 'employee benefit' should be understood to encompass health coverage and other benefits which a retired person receives from his or her former employer." (App., 28a-29a). Similarly, it held that "members of the plaintiff class are 'individuals' who have been treated differently by their 'employer' 'with respect to their compensation, terms, conditions, or privileges of employment.' " (App., 32a) (brackets omitted).

In *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997), this Court held that the word "employee", as used in Title VII, includes "former employees." Title VII makes it unlawful "for an employer to discriminate against any of his *employees*. . . . " 42 U.S.C. § 2000e-3(a) (emphasis added). This Court found that use of the word "employee" in this context could mean "current employee" or it could include "former employees." *Robinson*, 519 U.S. at 345. This Court concluded that the remedial nature of the statute compelled the conclusion that the ambiguity should be resolved in favor of extending its reach to former employees. *Robinson*, 519 U.S. at 345-46. Since the ADEA and Title VII have nearly identical provisions defining "employee", and both statutes "have a similar purpose – to stamp out discrimination in various forms – cases construing the definitional provisions of one are persuasive authority when interpreting the other[ ]." *Hyland v. New Haven Radiology Associates*,

PC, 794 F.2d 793, 796 (2d Cir. 1986). Recognizing this, the court of appeals properly concluded that *Robinson* "supports [its] interpretation" that the Retirees are entitled to the protection of the ADEA in this case.

> *Robinson* indicates that an employer's adverse actions taken against someone who has ceased actively working for that employer may constitute discrimination against an "employee." By analogy, an employer who treats retirees differently with respect to health care coverage because of their age may have engaged in discrimination with respect to "employee benefits."

(App., 30a).

The decision of the court of appeals in this case is consistent with the decisions of all other courts which have addressed this issue (with the sole exception of the district court in this case). *McKeever v. Ironworker's District Council*, 65 U.S.L.W. 2608, 70 Fair Empl. Prac. Cas. (BNA) 44548, 73 Fair Empl.Prac.Cas. (BNA) 1000, 1997 WL 109569, 109569 *3 (E.D.Pa. 1997) ("a finding that retirees are included within § 623(a)(1)'s coverage is more consistent with the broader context provided by other ADEA sections and with the ADEA's general remedial purposes"); *Schism v. United States*, 972 F.Supp. 1398, 1406 (N.D.Fla. 1997) ("[t]he term 'employee' under the ADEA may include retired employees challenging an allegedly discriminatory pension plan"); *Milwaukee Professional Fire Fighters Association, Local 215, IAFF, AFL-CIO v. City of Milwaukee*, 869 F.Supp. 633, 649 (E.D.Wis. 1994) ("the term 'employee' is to be interpreted broadly; retired employees are still considered 'employees' under the ADEA 'as long as the alleged discrimination is related to or arises out of

the employment relationship.' *EEOC v. Cosmair*, 821 F.2d 1085, 1088 (5th Cir. 1987). *See also Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C.Cir. 1991); *Caudill v. Farmland Industries*, 698 F.Supp. 1476, 1485 (W.D.Mo. 1988)").

Given the explicit language of the ADEA, and the clarification in the OWBPA that all employment benefits are covered by the ADEA, and the consistent prior case law directly on point, and the clarity of this Court's decision in *Robinson* interpreting a similar provision in Title VII, it is hardly surprising the County did not even assert on summary judgment that the Retirees may not be entitled to protection under the ADEA.

2. Because there is nothing in the text of the statute to support the County's position, it argues that "the legislative history of the OWBPA indicates that retirees were not intended to be covered." (Petition for Certiorari, p. 11) (emphasis omitted). The ADEA's prohibition against the discrimination against individuals in the terms, conditions and privileges of employment existed prior to passage of the OWBPA. There is nothing in the legislative history of the ADEA as originally enacted which supports the County's argument. Nonetheless, the County argues that the legislative history of the OWBPA, which was enacted to make it clear that the ADEA *did* apply to "any and all employee benefits", shows that Congress "intended" to exclude retirees from coverage. The obvious shortfall in this argument is that there is nothing in the text of the ADEA, before or after passage of the OWBPA, which supports this interpretation. Although certain members of Congress made statements

in the record which tend to support the position of the County, nothing in the text of statute supports it.

As the court of appeals observed, during consideration of the OWBPA several proposed amendments were introduced to specifically state that discrimination in the provision of health care benefits to retirees on the basis of Medicare eligibility would not violate the ADEA, and those amendments were never enacted. (App., 27a, n. 7). Moreover, in the OWBPA Congress did enact several new and very specific "safe harbor" exceptions to the prohibitions of the ADEA at 29 U.S.C. § 623(l)(1)(B) and § 623(l)(2)(A). (App., 96a-100a). One of these detailed exceptions specifically mentions "retiree health benefits", but only in the context of a safe harbor relating solely to severance benefits. 29 U.S.C. § 623(l)(2)(D). The legislative history does show Congress understood the issue, and the OWBPA as enacted does show that Congress knew how to articulate a specific exception if it wanted to. Nonetheless, when it finally passed the OWBPA Congress failed to articulate *any* exception permitting discrimination in the provision of health care benefits to retirees on the basis of their eligibility for Medicare benefits.

The court of appeals observed that despite a complete absence of any statutory support,

> it appears the district court simply recognized an additional safe harbor for an employer who treats its Medicare-eligible retirees less favorably with respect to health benefits than other retirees – a safe harbor which does not require the employer to satisfy the equal benefit or equal cost standard.

(App., 11a). Recognizing that "the language of the statute must guide us in the first instance" (App., 28a), the court of appeals concluded that "there is nothing in the language of the ADEA to indicate that these statements [in the legislative record relied upon by the County] are accurate and we do not find them to be persuasive." (App., 30a).

Despite statements in the legislative debates about retiree health care benefits, there is nothing in the text of the ADEA, as amended by the OWBPA, which supports the County's argument either that no retiree benefit is covered by the ADEA, or that there is some unwritten exception permitting discrimination in the provision of medical benefits to Medicare-eligible retirees.[6]

---

[6] The County continues to be unable to clearly articulate how it believes the ADEA should be interpreted, probably because the clearer it articulates its position the less defensible its position becomes. It remains unclear whether the position of the County is that absolutely *no* post-employment benefit is covered by the ADEA (in which case it makes no sense for Congress to even discuss pension or severance benefits since these are post-employment benefits), or that only benefits which are "discriminatorily structured" before retirement are covered (despite the complete absence of this distinction in the text of the statute and the absurd consequences which would flow from that interpretation as recognized by the court below), or that only retiree medical benefits generally or retiree medical benefits provided to Medicare eligible retirees in particular are not covered (again despite the complete absence of this distinction in the text of the statute).

The language of the statute must control, and the County's attempt to create an exception based on statements in the legislative debate, which were never incorporated into the text of the statute, was properly rejected by the court below.

3. The County also tries to create an ambiguity by asserting that the decision of the court below "creates a conflict" with a safe-harbor provision relating to severance benefits in 29 U.S.C. § 623(l)(2). (Petition for Certiorari, p. 19). The County attempts to create this "conflict" by ignoring the specific language of 29 U.S.C. § 623(l)(2)(D).

Section 623(l)(2) is one of the very specific safe harbors created in the OWBPA. Section 623(l)(2)(A) explains the circumstances under which an employer can deduct either "retiree health benefits" or pension benefits from severance pay without violating the ADEA. Section 623(l)(2)(D) then defines "retiree health benefits." It states: "For purposes of this paragraph [*i.e.*, paragraph (2) of § 623(l)] *and solely in order to make the deduction authorized under this paragraph,* the term 'retiree health benefits' means . . . . " 29 U.S.C. § 623(l)(2)(D) (emphasis added).

The County simply ignores this unambiguous language and argues that a finding that the ADEA bars discrimination against Medicare-eligible retirees in the provision of medical benefits absent satisfaction of the equal cost/equal benefit test creates an inconsistency with 29 U.S.C. § 623(l)(2)(D). Congress's express statement in § 623(l)(2)(D) that the definition of "retiree health benefits" in that paragraph is to be used "solely in order

to make the deduction authorized under this paragraph" means what it says – that an employer may meet the severance pay safe harbor if it complies with § 623(l)(2)(D), but providing retiree health care benefits consistent with the definition in the severance benefits safe harbor is relevant *solely* for that safe harbor. The court of appeals appropriately recognized that because § 623(l)(2)(D) expressly states that the definition of "retiree health benefits" in that paragraph is to be used "solely in order to make the deduction authorized under this paragraph", "Congress did not intend this provision to affect the interpretation of other portions of the ADEA." (App., 40a, n. 13). The County is arguing that it could provide "retiree health benefits" which satisfy the severance pay safe harbor provisions of § 623(l)(2)(D) and it could still violate the ADEA under the lower court's holding. This is exactly what the statute says, and there is, therefore, no "conflict."

4. Switching to another issue, and relying on this Court's decision in *Hazen Paper*, the County argues that even if the Retirees are protected by the ADEA as the court of appeals found, it did not discriminate against them "because of age." No court has agreed with the County on this point, not even the district court below.

In *Hazen Paper*, this Court dealt with the situation in which the employer discriminated on the basis of years of service, not age. This Court recognized that although there may be a "correlation" between age and years of service, "age and years of service are analytically distinct . . . . " *Hazen Paper*, 507 U.S. at 611. In this case, all the Retirees in the class became Medicare eligible solely as a result of their age, and they were, therefore, forced into

the SecurityBlue plan because of their age. As the court of appeals recognized, *Hazen Paper* is

> distinguishable. Medicare eligibility does not merely "correlate with age", as does years of service. Rather, as the district court here pointed out, Medicare eligibility "follows ineluctably upon attaining age 65." Thus, Medicare status is a direct proxy for age.

(App., 33a) (brackets and internal citations omitted).

The holding by the court of appeals below is consistent with the decisions of other courts of appeals. In *Johnson v. State of New York*, 49 F.3d 75 (2d Cir. 1995), the Air National Guard (ANG) had a policy that members of the ANG must retire at age 60. The plaintiff was employed by New York State (the "State"). The State had a "dual status" requirement, which required plaintiff to maintain his position with the ANG to maintain his employment with the State. Plaintiff turned 60 and, because of the ANG's policy, he was forced to retire from the ANG. When plaintiff retired from the ANG, the State terminated his employment. According to the State, plaintiff's employment with the State was terminated not because plaintiff turned 60, but because plaintiff lost his dual status when he was forced to retire from the ANG.

In rejecting the State's argument and finding a violation of the ADEA, the Second Circuit Court of Appeals held that "[t]he flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement at 60 . . . is not merely *correlated* with age; unlike *Hazen Paper*, the employer's decision here in fact *implements* an age-based criterion." *Johnson*, 49 F.3d at 79-80 (emphasis in original).

The Seventh Circuit Court of Appeals reached the same conclusion in *Huff v. UARCO, Inc.*, 122 F.3d 374 (7th Cir. 1997). In *Huff* the employer maintained a pension plan under which

> a plan participant who has completed ten years of service and attained the age of fifty-five is eligible for early retirement. The plan also provides that a person terminating employment before becoming eligible for early retirement may elect a lump sum refund of all of that person's contributions under the plan, with interest. But a person terminating employment after becoming eligible for early retirement is entitled only to a payout of benefits over time, actuarially adjusted to take into account the extra years of receiving the benefit.

Huff, 122 F.3d at 387. The court found that the plan discriminated against persons 55 and older because persons 55 and older with ten years of service must take a payout of pension benefits over time, while persons under age 55 with ten years of service could take a payout over time *or* elect a lump sum payout. The court rejected the employer's claim that under *Hazen Paper* the employer was permissibly acting on a basis other than age. The court found that

> [b]ecause age is an express condition of receiving a benefit, we think that the instant case presents a close approximation of the case *Hazen Paper* declined to decide. Nothing in *Hazen Paper* prohibits a finding that [the employer's] expressly age-related policy violates the ADEA. Under the policy, no worker under 55 would ever be denied a lump sum payout, regardless of that worker's years of service. But for the

> age-related restriction, certain workers over fifty-five would be eligible for the lump sum payout. This is not a case where there is merely a correlation between age and the denial of a particular benefit. [The employer's] policy draws an express line between workers over fifty-five and those under.

Huff, 122 F.3d at 388 (citations omitted). Whether the employer characterized the disparate treatment as based directly on age or on eligibility for early retirement is immaterial, since eligibility for early retirement is itself based directly on age. *See also Equal Employment Opportunity Commission v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 646 (9th Cir. 1992) (when the union's plan purports to discriminate only on the basis of retirement, but only employees 55 and older are eligible to retire, the employer is acting on the basis of age in violation of the ADEA); *Equal Employment Opportunity Commission v. Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984) (when an employer discriminates on the basis of retirement status, and retirement status is based on age, the employer discriminates on the basis of age for purposes of the ADEA).

In the present case, there is more than a "correlation" between age and the treatment the Retirees received. The Retirees' eligibility for Medicare, and therefore SecurityBlue, is *defined* by age. There is no need for statistical analysis. If a non-disabled retiree lives within the Highmark service territory and is age 65 or over, they *always* get the SecurityBlue plan; if a non-disabled retiree lives within the Highmark service territory and is under age 65, they *always* get the SelectBlue plan. The Retirees in the class are eligible for Medicare/SecurityBlue because of

their age. If they were age 64, they would not be eligible and they could have coverage under the SelectBlue plan.

Furthermore, the applicable regulations include 29 C.F.R. § 1625.10(e). This specific regulation expressly provides guidance on how an employer can permissibly discriminate on the basis of age and still meet the equal cost/equal benefit safe harbor by permitting certain benefits, including Medicare benefits, to be provided by the government. 29 C.F.R. § 1625.10(e) provides that "[a]n employer does not violate the [ADEA] by permitting certain benefits to be provided by the Government, *even though the availability of such benefits may be based on age. For example,* it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by *Medicare.*" (Emphasis added). This regulation was expressly incorporated into the ADEA in the passage of the OWBPA. 29 U.S.C. § 623(f)(2)(B). Congress's express incorporation of this regulation into the ADEA, and the plain recognition in the regulation that Medicare benefits may be "based on age", demonstrates even Congress understood, when it passed the OWBPA, that discrimination on the basis of age-based Medicare eligibility is discrimination "because of age" within the meaning of the ADEA.

Since the Retirees are being treated differently because they are 65 years of age or older, and therefore Medicare eligible, and not for some "analytically distinct" reason which is merely "correlated with" age, both the district court and the court of appeals properly held that the County is discriminating against the Retirees "because of age" within the meaning of the ADEA. There is no issue here which requires "settlement" by this court.

5. The County's final argument is basically a public policy argument. The County argues this court should review this matter because, according to the County, and based upon statistics which are outside the record in this case, many employers are discriminating in their provision of health care benefits to retirees on the basis of Medicare eligibility and they may, therefore, be violating the ADEA under the holding of the court of appeals below.[7] Whether the ADEA should be re-written to permit employers to discriminate against retirees when they reach Medicare age is a question of policy. The proper forum to debate this issue is in Congress, not the courts. Congress debated this issue when it passed the OWBPA, but never adopted the exception the County would like. If the County believes this was bad policy, its recourse is to return to Congress, not to have this Court make these policy decisions with no statutory support.

Furthermore, as explained above, the applicable regulation in 29 C.F.R. § 1625.10(e) makes it obvious that discrimination on the basis of Medicare eligibility can violate the ADEA unless the employer meets the provisions of that regulation explaining how Medicare benefits are to be coordinated with employer-provided benefits. This regulation was in effect before passage of the OWBPA, and was incorporated into the ADEA when the OWBPA was adopted. All the Federal decisional law

---

[7] The County fails to undertake any analysis of whether the employers who are purportedly discriminating against retirees in the provision of health care benefits on the basis of Medicare eligibility are nonetheless meeting the equal cost/equal benefit safe harbor.

decided after passage of the OWBPA overruled *Betts*, and before the decision by the district court in this case, has held uniformly that the ADEA *does* apply to the provision of employment benefits to retirees. It is unclear why the employers referred to by the County purportedly failed to comply with the ADEA in the face of all the contrary authority, but their alleged failure to understand or follow the law does not provide a compelling reason for this Court to grant review in this case.

In addition, the County's assertion about the possible consequences of the decision below is pure speculation. The County argues that if employers who are failing to comply with the ADEA must now do so, "employers may choose to comply with the ruling below by eliminating entirely retiree health care benefits." (Petition for Certiorari, at 28). Although this is always a possibility, it makes little sense. An employer could take the same amount it is currently spending on retiree health care benefits and if they are violating the ADEA, restructure their plans so the employer spends no more in total dollars, but provides benefits to all its retirees in a manner which does not violate the ADEA. Why employers who may be violating the ADEA would eliminate retiree health care coverage, when they can continue to spend no more in premium dollars and just restructure their plans so the plans do not violate the ADEA, is far from self-evident.

The wholly speculative nature of the County's argument is further exemplified by its assertion that "[g]iven the steady rise in the cost of retiree health care, a significant number of employers may choose to comply with the ruling below by eliminating entirely retiree health care

benefits." (Petition for Certiorari at 28). Of course, "given the steady rise in the cost of retiree health care," a significant number of employers may choose to eliminate entirely retiree health care benefits regardless of the decision in this case. On the other hand, many employers are contractually obligated to continue to provide health care benefits and the employer cannot just eliminate the benefits even if the cost goes up or they must comply with the ADEA.

Just because an employer is spending less on health care benefits for older retirees or providing different benefits to older retirees does not necessarily mean it is violating the ADEA. Even in this case, there has not been a finding that the County is violating the ADEA, since it still has an opportunity to show it meets the equal cost/equal benefit safe harbor provisions. The ADEA *does* permit employers to discriminate in the provision of medical benefits to retirees on the basis of Medicare eligibility, provided they comply with the statutory safe harbor provisions. In this case, if the County had spent the same amount on benefits for the Retirees, or if it provided the same benefits to the Retirees *even if it spends less*, it may still satisfy the safe harbor.

Interestingly, the County does not talk about the facts of *this* case when complaining of the consequences of the decision below. Here the County eliminated the cost of providing medical benefits to the Retirees, reduced the cost of providing medical benefits to the younger retirees, and used some of that savings to pay the increased costs for traditional indemnity insurance for its *active employees*. The County does not even attempt to explain why requiring it to provide medical benefits to its eligible

retirees in a way that does not violate the ADEA is undesirable. The facts of this case show that employers may react to the changing medical care environment in many different ways. There is, however, no merit in the County's argument that employers should be able to react in a way that violates the ADEA.

The issues involved in this case have been thoroughly and correctly decided by the court of appeals below. Its decision is consistent with prior case law, with prior regulations and with the EEOC's recent policy statement on the subject. There are no compelling reasons to grant the County's petition for a writ of certiorari.

CONCLUSION

The County's petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL J. PASTORE
Counsel of Record
5401 Uhlman Road
Fairview, PA 16415
Phone: (814) 836-2884
Fax: (814) 836-2974

Attorney for Respondents